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Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1993

ALLAN S. HALEY AND ROBERTA J. ROWLANDS,
Petitioners,

vs.

THE COMMISSIONER OF INTERNAL REVENUE AND THE UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

[NOTE: The First, Second, and Ninth Circuits are each in conflict as to Question 1. The Second, Fourth, Seventh and Ninth Circuits and the Court of Claims are in conflict as to Question 2.]

1. Whether a Tax Court decision can become final despite the fact that there are still pending before the Court four post-judgment motions, each filed before the 90-day period had run in which to appeal from the decision, which motions if granted would have led to reconsideration, modification or vacation of the original decision?

2. Whether, in the event the Tax Court decision did not become final, the statute of limitations has run against the assessment and collection of the taxes, penalties and interest in question?

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OPINIONS BELOW

There are two memorandum decisions by the United States Court of Appeals for the Ninth Circuit. Both were filed the same day, and are reported in table form at 5 F.3d 536 (9th Cir. 1993). The first, in

case no. 91-70739 on appeal from the unreported decision and orders of the Tax Court, is reprinted in full in the Appendix, beginning at page A-1. The second, on appeal in case no. 92-16391 from a summary judgment entered by the United States District Court for the Eastern District of California, is reprinted in full in the Appendix beginning with page A-6. The original decision of the Tax Court, entered on July 19, 1990, is reprinted at A-9. The *ex parte* order modifying that decision, entered on September 19, 1990, is reprinted at A-13. The subsequent order of the Tax Court calling for additional briefing on the post-judgment motions is reprinted at A-15. The final order of the Tax Court, disposing of all remaining post-judgment motions, entered on September 26, 1991, is reprinted at A-18. Finally, the decision of the district court granting summary judgment to respondent United States of America, reported at 805 F. Supp. 834 (E.D. Cal. 1993), is reprinted beginning at A-21.

JURISDICTION

Invoking Tax Court jurisdiction under 26 U.S.C. § 6213, taxpayers and petitioners Allan S. Haley and Roberta J. Rowlands filed on September 26, 1983 a timely petition in the Tax Court to redetermine a deficiency of $20,584 in income taxes asserted by the Commissioner in June 1983 for tax year 1975. Based on a failure to respond to a request for admissions which the Commissioner represented had been properly served on taxpayers' former counsel in April 1987, the Tax Court entered a default judgment for the Commissioner on July 19, 1990 (App. A-9,

infra). After extensive post-judgment proceedings, the Tax Court entered an order finally disposing of all pending matters on September 26, 1991. Taxpayers appealed on November 27, 1991 to the Court of Appeals for the Ninth Circuit. In an unreported decision entered on August 16, 1993, that Court held that it had jurisdiction to review only the order of September 1991, and none of the previous decisions or orders of the Tax Court.

Meanwhile, on November 22, 1991, after exhausting administrative remedies, the petitioners filed suit in the United States District Court for the Northern District of California to enjoin assessment and collection of the 1975 deficiency, and invoked jurisdiction under 26 U.S.C. § 6213 (1988), as well as under 28 U.S.C. §§ 1331, 1340, 1357 and 2201 (1964). The District Court entered summary judgment on that complaint on July 29, 1992 (A-21, *infra*); taxpayers appealed on August 3, 1992. The Ninth Circuit's opinion affirming that judgment was entered on August 16, 1993, the same day as its judgment in the related appeal from the Tax Court.

Taxpayers filed petitions for rehearing of both of the Ninth Circuit's decisions on August 30, 1993. These petitions were both denied in orders entered on October 14, 1993.

The jurisdiction of this Court to review the judgments of the Ninth Circuit in Nos. 91-70739 and 92-16391 is invoked under 28 U.S.C. § 1254 (1) (1964).

STATUTES AND RULES INVOLVED

This case involves the interpretation of the following statutes and rules:

1. 26 U.S.C. § 6213 (a) (1988) provides in part: " . . . no assessment of a deficiency in respect of any [income] tax . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted . . ., until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a) [the Tax Anti-Injunction statute], the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in a proper court, including the Tax Court. . . ."

2. 26 U.S.C. § 7481 (a) (1988) provides in part: ". . . the decision of the Tax Court shall become final— . . . [u]pon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time . . ."

3. 26 U.S.C. § 7483 (1988) provides in part: "Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. . . ."

4. 26 U.S.C. § 7485 (a) (1988) provides in part: "Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 7483 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a notice of appeal in respect of such portion has been duly filed by the taxpayer, and then only if the taxpayer—

> (1) on or before the time his notice of appeal is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the

deficiency in respect of which the notice of appeal is filed, and with surety approved by the Tax Court. . . ."

5. Fed. R. App. P. Rule 13 (a) provides in part:

"The running of the time for appeal [from a decision of the Tax Court] is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later."

6. Tax Ct. R. Prac. and P. Rule 162 provides:

"Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit."

STATEMENT OF THE CASE

In 1975, petitioners/taxpayers borrowed money to start up a wine wholesaling and importing firm, Bacchus Imports, Ltd., in Honolulu, Hawaii. In auditing taxpayers' 1975 return, the Commissioner charged that Bacchus was a sham corporation, and disallowed the interest on the start-up loan. (Bacchus Imports subsequently went on to bring a successful challenge in this Court to Hawaii's discriminatory liquor tax. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 [1984]).

In June 1983, the Commissioner asserted a deficiency of $20,584 in taxes paid by petitioners for calendar year 1975, based in large part on the disallowance of $36,000 in interest paid on the loan to start

up Bacchus. Petitioners challenged the deficiency by filing a timely petition in the Tax Court in September 1983. Because another $10,200 in disputed deductions on petitioners' 1975 return related to certain automobile leasing and stock subscription tax shelters which were being challenged then in Hawaii, petitioners' case was assigned for trial to Tax Court Judge Goffe, along with approximately 1,000 other cases from years 1975 through 1983 involving similar issues. None of these other cases, however, involved deductions in connection with the start-up of a full-time, taxpayer-owned business such as Bacchus. (*See Dixon v. Commissioner*, T.C. Memo 1991-614, 62 T.C.M. 1440 (1991).

Brian Seery, counsel for taxpayers, was served with a request for admissions by the Commissioner in April 1987, that all of the issues in taxpayers' case were no different from those decided in the Commissioner's favor in *Pike v. Commissioner*, 78 T.C. 822 (1982), *aff'd mem. op.*, 732 F.2d 164 (9th Cir. 1984). With no timely or adequate response on file, the Court had permitted Seery to withdraw from the case in August 1987. (In fact, Seery had not communicated with taxpayers about the request, and had disclosed only that he was withdrawing due to a conflict of interest.) Two years and eight months later, while taxpayers were still waiting for their case to come to trial, the Commissioner sought and was granted on July 19, 1990 a default judgment against taxpayers, based on facts deemed admitted due to their counsel's failure to respond properly to the request. The default led to a finding by the Court *sua sponte* that the transaction creating Bacchus had been "tax motivated" within the meaning of former 26 U.S.C. §

6621 (c) (originally § 6621 [d], enacted in 1984).

When taxpayers contacted their former counsel for an explanation of the default, they received no reply. (As taxpayers later found out, Seery instead wrote to the Tax Court and complained about errors in the decision, which led to Judge Goffe entering *ex parte* a "clarification" of his previous decision on Sepember 19, 1990. *See* No. 92-16391, Amended Motion to Take Judicial Notice, Tab 9.) On October 4, 1990, dissatisfied with Judge Goffe's September 19 clarification, Seery filed papers with the Tax Court to intervene in taxpayers' case for the purpose of filing motions to vacate and to reconsider the default decision. He disclosed that the Commissioner had improperly represented that the request for admissions had been served in compliance with Tax Court Rule 90, when it had not, and that he had conveyed this fact to Judge Goffe when the latter had brought disciplinary proceedings against him. Because Judge Goffe had not disclosed his awareness of the Commissioner's noncompliance with Rule 90 in granting the default against taxpayers, Seery asked that Judge Goffe be disqualified from ruling on the motions.

Taxpayers used Seery's disclosures as the basis for their own set of motions, sent to the Tax Court on October 12. The Court lodged on October 15 taxpayers' motion to vacate or revise and motion to reconsider findings of fact. On the same date, the Court filed taxpayers' motion for an order to show cause why judgment should not be entered against the Commissioner based on professional misconduct, motion for leave to file the motions to vacate and reconsider, and motion to disqualify Judge Goffe, on

the same basis as that requested by Seery.

Chief Judge Nims of the Tax Court denied without opinion the two motions to disqualify — Seery's on October 12, and taxpayers' on November 6. Just over 30 days later, the Commissioner assessed on December 11, 1990 taxes of $20,584 as found by Judge Goffe, along with penalty interest retroactive to 1975 of $73,043, pursuant to the sham finding in the default decision. Taxpayers immediately wrote the Commissioner that his assessment was premature, because of the pending post-judgment motions still not decided by the Tax Court, and cited *Simon v. Commissioner*, 176 F.2d 230 (2d Cir. 1949).

Judge Goffe entered an order on January 11, 1991 calling for further briefing with respect to the pending motions. While this was occurring, the Commissioner started collection proceedings against taxpayers. To prevent this, taxpayers filed with the Court on May 16, 1991 a motion to restrain assessment and collection, pursuant to Tax Court Rule 55.

On September 26, 1991, Judge Goffe entered an order disposing of all pending post-judgment motions. He denied Seery's motion to intervene, and ruled that his other motions could thus not be entertained. He denied taxpayers' motions for leave to file out of time and for an order to show cause. He directed the Clerk to "unfile" the motion to restrain assessment and collection, and return the original to taxpayers, thereby removing it from the record in the case. He gave no reasons in his order for any of his denials of taxpayers' or Seery's motions.

On October 30, 1991 the Commissioner recorded a notice of lien in the county of taxpayers' residence. On November 8, taxpayers filed an

administrative protest, which the Commissioner ultimately denied on January 15, 1992.

On November 22, 1991, taxpayers filed suit in the United States District Court for the Northern District of California to enjoin assessment and collection of the tax, on the ground that the assessment on which the Commissioner had been acting was premature, and hence null and void. On November 27, 1991, taxpayers took their appeal to the Ninth Circuit from all of Judge Goffe's decisions and orders, as well as from Judge Nims's order refusing to disqualify Judge Goffe.

Because of the public lien affecting all of their property, taxpayers were unable to post a bond for their appeal pursuant to 28 U.S.C. § 7485 (No. 92-16391, Excerpt of Record Tab 14, ¶ 4). However, the Commissioner did not, following the Tax Court's denial of all pending post-judgment motions, make any new assessment of the tax, as permitted by § 7485 where an appeal without bond is taken.

On July 29, 1992, the district court granted the government's motion for summary judgment against taxpayers' complaint. It distinguished the *Simon* case, in which the taxpayer had filed on the 90th day after the initial decision a motion for leave to file out of time a motion for rehearing, on the ground that the Tax Court in that case had *granted* (on the 91st day) the motion for leave to file, whereas in this case the Tax Court had denied (on the 434th day) taxpayers' motion for leave to file.

Taxpayers appealed both decisions to the Ninth Circuit. Both cases (although not consolidated) were decided by the same panel, without oral argument. In a memorandum decision affirming the

Tax Court's denial of the motion for leave to file out of time, the Ninth Circuit held that the Tax Court had not abused its discretion in doing so, and that it had no jurisdiction to entertain an appeal from any other decision of the Tax Court, since the earlier decisions and orders had all become "final" as of the moment the Tax Court denied the motion for leave to file out of time. (The Ninth Circuit read *Simon* to mean that the earlier decisions and orders of the Tax Court would not be final, and hence would be reviewable on appeal, only if the Tax Court in its discretion had *granted* the motion for leave to file out of time the motions to vacate or reconsider. The result was to graft a new sentence onto F. R. App. P. Rule 13[a], quoted at p. 5, *supra*, to the effect that: "Motions for leave to file out of time a motion to vacate or revise a decision, made more than 30, but not more than 90, days from the entry of the decision also terminate the running of the time for appeal, but only if the Tax Court subsequently *grants* the motion for leave to file, whensoever such action occurs.") Because of this reading of *Simon*, the Ninth Circuit also affirmed the summary judgment of the District Court that injunctive relief against assessment and collection could not be granted, since the Tax Court's denial of the motion for leave to file in September 1991 meant that the original decision was retroactively "final" when the Commissioner made his assessment in December 1990.

Taxpayers have brought this petition for certiorari to review the two decisions of the Ninth Circuit.

REASONS FOR GRANTING REVIEW

A. This Court Should Resolve the Conflict Among Circuits as to When a Tax Court Decision Is Final

There is disagreement among at least three Circuit Courts of Appeal as to when a decision of the Tax Court becomes final under the circumstances of this case. The disagreement extends back over fifty years, and has never been resolved by this Court. Because "[t]he time of appealability, having jurisdictional consequences, should above all be clear" (*Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202, 108 S.Ct. 1717, 100 L.Ed. 2d 178 [1988]), this Court should grant taxpayers' petition in order to provide future litigants with a definitive rule.

The disagreement began following the Tax Court's adoption in 1938 of Rule 19, Tax Court Rules of Practice and Procedure (now Rules 161-162), which imposed a requirement that in order to be considered "timely", motions for rehearing or reconsideration had to be filed within thirty days after entry of the Court's decision. Then as now, decisions of the Tax Court became final by statute unless an appeal was taken within 90 days of entry of the decision (former 26 U.S.C. § 1142, now § 7483 [1988]). The effect of the new Rule was that any motion to vacate or reconsider filed after thirty, but within ninety, days of the original decision had to be accompanied by a "motion for leave to file out of time" which explained the reasons for filing beyond the Rule's 30-day limit.

In *Denholm & McKay Co. v. Commissioner*, 132 F.2d 243 (1st Cir. 1942), the First Circuit held that the filing of a motion to reconsider (unaccompanied

by a motion to file out of time) more than thirty, but less than ninety, days from the date of the Tax Court's original decision did *not* suspend the running of the appeal period. The opinion went on to hold that although the Tax Court could in its discretion still act on the motion before the expiration of the 90th day, it lost all jurisdiction *either to grant or to deny* any pending motions before it once the 90-day period had run (132 F.2d at 249). If it denied the motion in that period, the appeal time was not tolled. If, however, it did modify or revise its decision, a new appeal period started from the date of the revision (*ibid.*).

The First Circuit's decision in *Denholm* was criticized by the Second Circuit seven years later in *Simon v. Commissioner*, 176 F.2d 230, 232 (2d Cir. 1949). There the taxpayer had filed, on the 90th day itself, a motion for leave to file out of time a motion "for review by the full court" (176 F.2d at 231). The Tax Court did not act on the motion for leave until the next day, after expiration of the 90-day appeal period. It granted the motion for leave to file out of time, ordered that the motion for review be filed as of that date (*i.e.*, the 91st day), and denied the latter motion on that same day (*ibid.*)

The Government argued that the taxpayer's appeal from the denial of the motion to reconsider was untimely. Writing for a unanimous panel that included Chief Judge Learned Hand and Judge Charles Clark, Judge Jerome Frank said (*id.* at 232; emphasis supplied):

> We do not agree with the First Circuit [in *Denholm*]. We think that the period [in which to appeal] *was extended by the filing of the*

> *motion [for leave] within the statutory period;* otherwise, the taxpayer's privilege to seek review in a Circuit Court of Appeals would depend on the state of the Tax Court's docket.

After *Simon*, no subsequent case ever followed the holding in *Denholm*. Although the report of the case is unclear as to dates, the Seventh Circuit in *Estate of Frieders v. Commissioner*, 687 F.2d 224 (7th Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) applied the same rule as in *Simon*, and entertained an appeal on the merits where the taxpayers filed a motion for leave to file a motion for reconsideration on the 82nd day after the original decision, and the Tax Court had denied the motion (687 F.2d at 228; whether before or after the 90th day, the case does not say).

The decisions below refuse to follow either *Simon* or *Denholm* consistently, and bring the Ninth Circuit into conflict with both the First and Second Circuits. Both the District Court and the Ninth Circuit held, contrary to *Denholm*, that the Tax Court still had jurisdiction to act on the post-judgment motions eleven months after the original 90-day period had run. Contrary to the express language of *Simon* quoted above, however (and possibly contrary to *Estate of Frieders* as well), the District Court and the Court of Appeals held that the filing itself of the motion for leave to file out of time did not suspend the running of the time for appeal unless the Tax Court were subsequently to grant the motion, even more than a year after the decision. The consequence of these holdings is precisely what the First Circuit sought to avoid with its rule in *Denholm*. As Judge Magruder explained, if finality depends upon the

action taken by the Tax Court on the motion for leave to file, then neither the taxpayer nor the Commissioner has any way of knowing in the interim whether the original decision has become final, because the decision of whether or not to entertain the motion to vacate is "locked up in the bosom of the [Tax Court Judge]" (132 F.2d at 248; footnote omitted).

At the same time, the decisions below are subject to the very criticism leveled by *Simon* against the rule in *Denholm*. If the taxpayers do not discover grounds for reconsideration until late into the appeal period, as here, then their right to seek review in the event of a denial of the motion "depend[s] on the state of the Tax Court's docket." If they file an appeal before the Tax Court rules on the pending motion, then the grounds for reconsideration will not be reviewable by the appellate court, since they were not addressed below. The result is to force taxpayers into a Hobson's choice: either forego the new grounds for reconsideration, or take a gamble on the Tax Court granting the motion for leave to file out of time.

As a result of the Ninth Circuit's affirmance, the District Court's opinion at 805 F. Supp. 834 is now the law in the Ninth Circuit. As just discussed, it is at odds with both the law of the First Circuit in *Denholm* and the law of the Second Circuit in *Simon*. It creates a category of quasi-final decisions that, like Schrödinger's cat, depend for their life on the action of the decision-maker, which may occur at any time over an indefinite period. This Court should exercise its prerogative to resolve the conflict, so that "the time of appealability . . . above all [will] be clear." It can do so by granting a writ of certiorari in this case.

B. This Court Should Resolve a Conflict as to the Validity of an Illegally Premature Assessment of Taxes

By statute, the Commissioner is commanded that "no assessment of a deficiency . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until . . . the decision of the Tax Court has become final." 26 U.S.C. § 6213 (a) (1988).

As the opinion of the District Court recognizes, law in the Ninth Circuit holds that a premature assessment of taxes is a nullity. *Ventura Consolidated Oil Fields v. Rogan*, 86 F.2d 149, 154, 156, 161 (9th Cir. 1936), *cert. denied*, 300 U.S. 672 (1937). Courts of the Second, Fourth and Seventh Circuits are in accord. *United States v. Walker*, 217 F. Supp. 889, 890 (W.D.S.C. 1963); *United States v. Barber*, 24 F. Supp. 229, 235-36 (D. Md. 1938); *United States v. Yellow Cab Co.*, 90 F.2d 699, 699-701 (7th Cir. 1937); *cf. American Equitable Assurance Co. v. Commissioner*, 68 F.2d 46, 48 (2d Cir. 1933) (valid as jeopardy assessment).

A decision of this Court with respect to tax assessments predating the Sixteenth Amendment also furnishes support for such a rule. *Clinkenbeard v. United States*, 88 U.S. (21 Wall.) 65, 68-71, 22 L.Ed. 477 (1874). The Court of Claims, however, disagrees. *Lyddon & Co. v. United States*, 158 F. Supp. 951, 954-55 (Ct. Cl.), *cert. denied*, 358 U.S. 832 (1958); *Lehigh Portland Cement Co. v. United States*, 30 F. Supp. 217, 229-233 (Ct. Cl. 1939).

If this Court grants the petition for certiorari as to the first question and adopts the rule of *Simon v. Commissioner*, *supra*, it will then be faced with the conflict between the Court of Claims and the other

circuits. Unlike the litigants before the Court of Claims, taxpayers in this case exercised their statutory right to have the assessment enjoined at the earliest opportunity, after first being denied administrative relief and relief in the Tax Court. A resolution of this conflict will serve both the Commissioner and taxpayers by making it clear that, like a notice of appeal filed too early, an assessment made when it is forbidden by law to do so is an act which preserves no legal rights. In that event, this case will be at an end.

CONCLUSION

Both the Commissioner and taxpayers alike are in need of definitive rules as to when a decision of the Tax Court becomes final, and when an assessment may properly be made. For the reasons given in the preceding section, the Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 16 1993
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

ALLAN S. HALEY; ROBERTA J. ROWLANDS, Petitioners-Appellants, v. COMMISSIONER, INTERNAL REVENUE SERVICE, Respondent-Appellee.	No. 91-70739 Tax Court No. 28076-83 MEMORANDUM*

Appeal from a Decision of the
United States Tax Court

Submitted August 11, 1993**
San Francisco, California

Before: SNEED, POOLE, and TROTT, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4.

Allan Haley and Roberta Rowlands appeal the Tax Court's denial of their petition to redetermine an income tax deficiency for the 1975 tax year and the Tax Court's denial of their motion for leave to file out of time a motion to vacate or revise the Tax Court's denial of the petition. We affirm in part and dismiss in part.

I

The Tax Court entered an order denying the taxpayers' petition for redetermination on July 19, 1990. Taxpayers filed a notice of appeal on November 27, 1991. "review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered." 26 U.S.C. § 7483 (1988); *see also* Fed. R. App. P. 13 (a). We lack jurisdiction if there is no timely notice of appeal. *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1217 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 2306 (1992).

A

Taxpayers argue the running of the time for appeal was suspended by their filing of a timely motion to vacate or revise the Tax Court's decision. *See* Fed. R. App. P. 13 (a). "Any motion to vacate or revise a decision . . . shall be filed within 30 days after decision has been entered, unless the Court shall otherwise permit." Tax Ct. R. 162.

On October 15, 1990, more than 30 days from the Tax Court's order, the taxpayers filed a motion for leave to file a motion to vacate or revise out of time. At the same time, they lodged with the Tax Court a motion to vacate or revise. In a September 26, 1991, order, the Tax Court denied the motion for leave to file out of time and directed the motion to vacate not be filed.

Taxpayers argue that their motion to revise or vacate

was timely because the Tax Court's order of September 19, 1990, "modified" its order of July 19, 1990, and started a new period for appeal under the decision in *Denholm & McKay Co. v. Commissioner*, 132 F.2d 243 (1st Cir. 1942). They contend their unfiled motion to vacate or revise should be deemed to have been timely filed on October 15, 1990. Therefore, they argue, pursuant to Fed. R. App. P. 13 (a), the period for appealing the July 19, 1990, order should not have begun to run until September 26, 1991, when the Tax Court denied the taxpayers' motion for leave to file out of time. This argument must fail because the Tax Court's September 19, 1990, order merely *clarified* the July 19, 1990, order, did not change in any way the substantive effect of the July 19, 1990, order, and expressly stated "[t]he issuance of this order does not affect the running of the time period set forth in sections 7481 and 7483 of the Internal Revenue Code." We have examined the relevant parts of the record on this issue and have concluded that appellant's contention that the Tax Court "modified" its order of July 19, 1990, is not correct.

B

Taxpayers also argue the filing of a motion for leave to file out of time suspends the running of the appeal period. However, they cite no case which supports this proposition. The cases which taxpayers do cite indicate only that a timely motion to vacate or revise suspends the appeal period, *see, e.g., Griffiths v. Commissioner*, 50 F.2d 782, 784 (7th Cir. 1931),[1] and the grant of leave to file out of time followed by a denial of a motion to vacate for revise suspends the appeal period,

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[1]At the time *Griffiths* was decided, the appeal period was six months, *see Burnet v. Lexington Ice & Coal Co.*, 62 F.2d 906, 907 (4th Cir. 1933), and there was no shorter period analogous to that prescribed by Tax Court R. 162 for filing a motion to vacate or revise, *see Denholm*, 132 F.2d at 248-49.

see, e.g., Simon v. Commissioner, 176 F.2d 230, 231-32 (2d Cir. 1949). In the present case, the Tax Court denied the motion for leave to file out of time, so no motion to vacate or revise was ever filed. We decline both to accept taxpayers' extended reading of *Simon* and to hold that the mere filing of a motion for leave to file out of time suspends the appeal period.

C

Because we dismiss their appeal of the Tax Court's July 19, 1990, order and therefore do not reach their challenge to the merits of the Tax Court's decision, we also deny as moot the taxpayers' Amended Motion to Take Judicial Notice.

D

Based on the foregoing analysis and out holding in Part II of this disposition, the taxpayers' appeal of the July 19, 1990, order is dismissed as untimely.

II

Taxpayers appeal the Tax Court's September 26, 1991, order denying their motion for leave to file out of time. Because the taxpayers' notice of appeal was filed November 27, 1991, within 90 days of the September 26, 1991, order, we have jurisdiction pursuant to 26 U.S.C. § 7483 and Fed. R. App. P. 13 (a).

We review for abuse of discretion the Tax Court's denial of a motion for leave to file out of time. *Abatti v. Commissioner*, 859 F.2d 115, 117 (9th Cir. 1988). "We will reverse for abuse of discretion only if we have a definite and firm conviction that the Tax Court committed a clear error of judgment in the conclusion it reached." *Id.*

Taxpayers argued in their motion that they had been

unaware of the basis for a motion to vacate or revise, because they were unaware of certain facts regarding their representation by Brian Seery at an earlier stage of these proceedings. We conclude the Tax Court did not abuse its discretion in denying the taxpayers' motion, because taxpayers properly are chargeable with knowledge of their former counsel's actions during the course of the representation. *See Kung v. FOM Inv. Corp.*, 563 F.2d 1316, 1318 (9th Cir. 1977).

Although this disposition is brief, we note that we have examined the issues raised with great care. Appellant taxpayers' briefs raise many points that require analysis and thought. After engaging in that process, we are left with the distinct impression that appellant taxpayers injudiciously and inappropriately distanced themselves from *their own petition*, preferring until too late to leave it in the hands of attorneys provided by others. Appellant taxpayers' own lack of attention and diligence explains most of their procedural misfortunes. Rules are for a purpose. Failure to comply with rules has consequences. Under the circumstances, 13th-hour pleas for mercy and discretion from the Tax Court and the IRS are not well grounded.

AFFIRMED IN PART and DISMISSED IN PART.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 16 1993
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

ALLAN S. HALEY; ROBERTA J. ROWLANDS, Plaintiffs-Appellants, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant-Appellee.	No. 92-16391 D.C. No. CV-91-01617-WBS (PAN) MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted August 11, 1993**
San Francisco, California

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4.

Before: SNEED, POOLE, and TROTT, Circuit Judges.

Allan Haley and Roberta Rowlands ("taxpayers") appeal the district court's grant of summary judgment in favor of the Commissioner of Internal Revenue in their action under 26 U.S.C. § 6213 (a) (1988) to enjoin a tax deficiency assessment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Taxpayers argue a deficiency assessment on December 12, 1990, of $98,550.44 in taxes due for the tax year 1975 was improper, because the Tax Court's order denying their petition for redetermination of the deficiency was not yet final. "[N]o assessment of a deficiency in respect of any tax . . . shall be made . . . until the decision of the Tax Court [on a petition for redetermination] has become final." 26 U.S.C. § 6213 (a). A decision of the Tax Court becomes final "[u]pon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time." 26 U.S.C. § 7481 (a) (1). A notice of appeal must be filed "within 90 days after the decision of the Tax Court is entered." 26 U.S.C. § 7483.

The Tax Court entered a decision denying the taxpayers' petition for redetermination on July 19, 1990. The 90-day period for appeal expired on October 17, 1990. The taxpayers filed no notice of appeal on or before October 17, 1990, so the decision of the Tax Court became final on that date under 26 U.S.C. § 7481 (a) (1). Therefore, the district court did not err in concluding the December 12, 1990, assessment was proper.

Taxpayers argue a September 19, 1990, order of the Tax Court "modified" the July 19, 1990, order and restarted the running of the period for appeal. We agree with the district court that the September 19, 1990, order merely *clarified* the July 19, 1990, order, and expressly stated "[t]he

issuance of this order does not affect the running of the time period set forth in sections 7481 and 7483 of the Internal Revenue Code."

Taxpayers also argue that under *Simon v. Commissioner*, 176 F.2d 230 (2d Cir. 1949), the running of the appeal period was suspended by their filing on October 15, 1990, of a motion for leave to file out of time a motion to vacate or revise the Tax Court's decision. We note that a timely filing of a motion to vacate or revise suspends the running of the appeal period. Fed. R. App. P. 13 (a). *See also Trohimovich v. Commissioner*, 776 F.2d 873, 875 (9th Cir. 1985) ("[I]f within 30 days of entry of the decision, a party filed a motion to vacate or to revise the decision pursuant to Rule 162 of the Rules of Practice and Procedure of the United States Tax Court, the time for filing a notice of appeal is tolled until the Tax Court rules on the motion."). The holding in *Simon* is not to the contrary. There, the court held the appeal period was suspended where the Tax Court granted leave to file out of time and subsequently denied the motion to vacate or revise. *Simon*, 176 F.2d at 231-32. In the instant case, however, the Tax Court denied the motion for leave to file out of time, so no motion to vacate or revise was ever filed. We decline both to accept taxpayers' extended reading of *Simon*, and to hold that the mere filing of a motion for leave to file out of time tolls the appeal period.

AFFIRMED.

UNITED STATES TAX COURT
Washington, D.C. 20217

ALLAN S. HALEY AND ROBERTA J. ROWLANDS, Petitioners,	)	Docket No. 28076-83
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	KERSTING

ORDER AND DECISION

On February 1, 1990, the Court served upon petitioners its Order to Show Cause in which it ordered petitioners, on or before March 5, 1990, to file a response to its order as to why judgment should not be entered against them based upon the Court's decision in *Pike v. Commissioner*, 78 T.C. 822 (1982). The Court filed petitioners' response on March 5, 1990.

In their response petitioners allege that they did not receive the response to [*sic*] the Request for Admissions served by respondent. Petitioners allege that they had nothing to do with the selection of Brian Seery or Thomas Dunn as their counsel but that petitioners had an understanding with Henry Kersting that he would arrange for representation of petitioners. Petitioners, in their response, complain that respondent was delinquent in not filing a motion to review under Rule 90 (e) to question the sufficiency of the response filed by Thomas Dunn to respondent's Request for Admissions.

Brian J. Seery entered his appearance in this case to

represent petitioners on August 20, 1984. He executed a Stipulation of Settlement for Tax Shelter Adjustments on behalf of petitioners on November 24, 1986.

On April 2, 1987, respondent served Respondent's Request for Admissions upon Seery which, under Rule 90 (c) of the Court's Rules of Practice and Procedure and as recited in Respondent's Request for Admissions, required a response within 30 days of service, or May 4, 1987. Respondent was correct in serving Seery as he was counsel of record for petitioners on the date of service. Neither counsel for respondent nor the Court has any responsibility to serve a petitioner when there is an entry of appearance on the record in the case.

On May 26, 1987, the Court filed an entry of appearance of Thomas P. Dunn on behalf of petitioners and on the same date the Court filed Response to Request for Admissions executed by Dunn. The response was untimely and not accompanied by a motion for leave to file out of time. The response neither admitted nor denied the matters contained in Respondent's Request for Admissions and also referred to paragraph 4 (j) of the petition. There is no paragraph 4 (j) in the petition. The response executed by Dunn also promised to file an additional response on or before July 6, 1987. No additional response was filed.

Seery withdrew on August 12, 1987, and the Court accepted Dunn's resignation from the bar of this Court on July 19, 1989, and withdrew Dunn as counsel in this case.

Under the provisions of Rule 90 (c) of the Court's Rules of Practice and Procedure, the matters contained in Respondent's Request for Admissions were deemed admitted on May 4, 1987, because there was no timely response filed. This required no further action on behalf of respondent or the Court. The response filed by Dunn was a nullity because the time within which to file a response was never extended

beyond May 4, 1987, nor was any motion ever filed to extend such time. Respondent's Request for Admissions requested petitioners to admit that all of the assignments of error in paragraphs 4(a) through 4 (g), inclusive, of the petition are the same transactions that were involved in *Pike*.

Petitioners' failure to respond to Respondent's Request for Admissions established the facts that all of those assignments of error were decided by *Pike*.

Petitioners chose to act through Henry Kersting, their agent, and the agents he selected to represent them. Petitioners are, therefore, chargeable with the acts of their agents. If their agents failed to keep them properly advised or failed to act timely or properly, those are matters between petitioners and their agents.

In the statutory notice of deficiency the Commissioner determined that petitioners were liable for an addition to tax under the provisions of section 6653 (a) of the Internal Revenue Code. In the Stipulation of Settlement of Tax Shelter Adjustments filed on December 1, 1986, respondent conceded that petitioners were not liable for any additions to tax under section 6653 (a) for any year prior to 1982. The taxable year involved in this case is 1975. Accordingly, the said stipulation and request for admissions disposes of all of the errors assigned in the petition. The premises considered, it is

ORDERED AND DECIDED, that the Order to Show Cause served upon petitioners on February 1, 1990, is hereby made absolute and petitioners are liable for a deficiency in income tax for taxable year 1975 in the amount of $20,584.00.

That the deficiency constitutes a substantial underpayment attributable to tax motivated transactions within the meaning of section 6621 (c), formerly section 6621 (d), Internal Revenue Code of 1954, as amended.

(signed) William A. Goffe
Judge

ENTERED: JUL 19 1990

UNITED STATES TAX COURT
Washington, D.C. 20217

ALLAN S. HALEY AND ROBERTA J. ROWLANDS, Petitioners,	)	Docket No. 28076-83
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	KERSTING

ORDER

On July 19, 1990, the Court served its Order and Decision in this case. For cause, it is

ORDERED, that the preamble of such Order and Decision is clarified by stating that respondent may very well have agreed to extend the time for petitioners to file a response to Respondent's Request for Admissions but only the Court can grant such an extension and no one ever asked that the Court extend such period. Rule 90 (c), Tax Court Rules of Practice and Procedure. In any event, the response filed on May 26, 1990 [*sic*], did not comply with Rule 90 of the Court's Rules in that it neither admitted nor denied the matters contained in Respondent's Request for Admissions. The response was, therefore, a nullity and the matters contained in Respondent's Request for Admissions are deemed admitted.

The Order and Decision entered in this case on July 19, 1990, remains in full force and effect. The issuance of this order does not affect the running of the time period set forth

in sections 7481 and 7483 of the Internal Revenue Code.

(signed) William A. Goffe
Judge

Dated: Washington, D.C.
September 19, 1990

UNITED STATES TAX COURT
Washington, D.C. 20217

ALLAN S. HALEY AND ROBERTA J. ROWLANDS, Petitioners,	)	Docket No. 28076-83
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	KERSTING

ORDER

On July 19, 1990, an Order and Decision was entered in the above-docketed case. On September 19, 1990, the Court issued an order clarifying its order and decision.

On October 4, 1990, the Court lodged an Entry of Appearance from William L. Bransford as "attorney for the Intervenor Brian J. Seery." On October 4, 1990, the Court filed Brian J. Seery's Motion to Intervene for Purposes of filing Motion to Vacate Decision or in the Alternative, For Reconsideration of Findings of Fact and lodged Mr. Seery's Motion to File Motion to Vacate Decision or in the Alternative for Reconsideration of Findings of Fact Out of Time and Motion to Vacate or Revise Decision or Alternatively for Reconsideration of Findings of Fact. On October 4, 1990, the Court filed Mr. Seery's Motion to Disqualify Judge Goffe from Hearing Motion to Intervene, which motion was denied by Chief Judge Arthur L. Nims on October 12, 1990.

On October 15, 1990, the Court filed petitioners'

Motion to File Motions to Vacate or Revise Decision and to Reconsider Findings of Fact out of Time and lodged petitioners' Motion to Vacate or Revise Decision and Motion to Reconsider Findings of Fact. On that same date the Court filed petitioner's Motion for Order to Show Cause Why Judgment Should not be Entered Against Respondent on the Basis of Professional Misconduct. On October 15, 1990, the Court filed petitioners' Motion to Disqualify Judge Goffe from Hearing Motions to Vacate or Revise, to Reconsider, and for Order to Show Cause, which motion was denied on November 6, 1990, by Chief Judge Arthur L. Nims, III.

The granting or denial of a motion to vacate a decision of this Court rests within the discretion of this Court. The granting or denial of the other motions enumerated above rests within the discretion of this Court. Before this Court exercises its discretion in this matter, it is interested in having the reviews [*sic*] of respondent. The premises considered, it is

ORDERED, that respondent shall file, on or before March 11, 1991, written responses to the following: (1) Brian J. Seery's Motion to Intervene for Purposes of filing Motion to Vacate Decision or in the Alternative, For Reconsideration of Findings of Fact; (2) Mr. Seery's Motion to File Motion to Vacate Decision or in the Alternative for Reconsideration of Findings of Fact Out of time; (3) Mr. Seery's Motion to Vacate or Revise Decision or Alternatively for Reconsideration of Findings of Fact; (4) petitioners' Motion for Order to Show Cause Why Judgment Should not be Entered Against Respondent on the Basis of Professional Misconduct; (5) petitioners' Motion to File Motions to Vacate or Revise Decision and to Reconsider Findings of Fact out of Time; (6) petitioners' Motion to Vacate or Revise Decision; and (7) petitioners' Motion to Reconsider Findings of Fact. Upon receipt of respondent's responses, the Court will take such further action as it deems necessary.

(signed) William A. Goffe
Judge

Dated: Washington, D.C.
January 11, 1991

UNITED STATES TAX COURT
Washington, D.C. 20217

ALLAN S. HALEY AND ROBERTA J. ROWLANDS, Petitioners,	)	Docket No. 28076-83
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	KERSTING

ORDER

On July 19, 1990, the Court entered its Order and Decision in this case. On September 19, 1990, the Court clarified its Order and Decision by an order which provided, in part, that the Order and Decision entered on July 19, 1990, remained in full force and effect and that the issuance of the order did not affect the running of the time period set forth in sections 7481 and 7483 of the Internal Revenue Code.

On October 4, 1990, counsel on behalf of Brian Seery filed a Motion to Intervene for Purposes of filing Motion to Vacate Decision or in the Alternative, For Reconsideration of Findings of Fact and on that same date lodged a Motion to File Motion to Vacate Decision or in the Alternative for Reconsideration of Findings of Fact out of Time and Motion to Vacate or Revise Decision or Alternatively for Reconsideration of Findings of Fact.

On March 4, 1991, the respondent filed a Response to Motion to Intervene for Purposes of filing Motion to Vacate Decision or in the Alternative, For Reconsideration of

Findings of Fact filed by Counsel for attorney Brian J. Seery.

On October 15, 1990, the petitioners filed a Motion to File Motions to Vacate or Revise Decision and to Reconsider Findings of Fact out of Time and on that same date lodged a Motion to Reconsider Findings of Fact and Motion to Vacate or Revise Decision.

On March 4, 1991, the respondent filed a Response to Motion to File Motions to Vacate or Revise Decision and to Reconsider Findings of Fact out of Time.

On October 15, 1990, the petitioners filed a Motion for Order to Show Cause Why Judgment Should not be Entered against Respondent on the Basis of Professional Misconduct. On March 4, 1991, the respondent filed a Response to Petitioners' Motion for Order to Show Cause Why Judgment Should not be Entered against Respondent on the Basis of Professional Misconduct.

In ruling upon the said motions the Court also considered Petitioners' Reply to Responses by Respondent to Pending Motions filed by the Court on May 13, 1991.

On May 16, 1991, the Court received from petitioners, Motion to Restrain Assessment and Collection. In view of the denial of the motions set forth above, the Order and Decision entered on July 19, 1990 remains in full force and effect and the said motion, therefore, cannot be filed and ruled upon. The premises considered, it is

ORDERED that the Motion on behalf of Brian Seery to Intervene for Purposes of filing Motion to Vacate Decision or in the Alternative, For Reconsideration of Findings of Fact filed on October 4, 1990, is DENIED. In view of the denial of said motion, the Court will not file the motions which were lodged on October 4, 1990. It is further

ORDERED that petitioners' Motion to File Motions to Vacate or Revise Decision and to Reconsider Findings of Fact out of Time is DENIED. In view of the denial of said

motion, the Court will not file the motions which were lodged with the Court on October 15, 1990. It is further

ORDERED that petitioners' Motion for Order to Show Cause Why Judgment Should not be Entered against Respondent on the Basis of Professional Misconduct is DENIED. It is further

ORDERED that the Clerk of the Court shall return to petitioners the Motion to Restrain Assessment and Collection, along with the served copy of this Order.

(signed) William A. Goffe
Judge

Dated: Washington, D.C.
September 26, 1991

FILED
JUL 29 1992
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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ALLAN S. HALEY, et al.,

Plaintiffs,

v.

COMMISSIONER OF INTERNAL REVENUE,

Defendant.

NO. CIV. S-91-1617-WBS

MEMORANDUM AND ORDER

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This matter is before the court on cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56. Jurisdiction is predicated on 28 U.S.C. § 1331.

FACTS

On April 15, 1976, plaintiffs Allan S. Haley and Roberta J. Rowlands, filed an income tax return for the year ending December 31, 1975. Plaintiffs later agreed to extend the time within which any income taxes due for 1975 would be assessed. Accordingly, on June 29, 1983, the Internal Revenue Service mailed plaintiffs a Notice of Deficiency for

income taxes paid in 1975. Plaintiffs responded by filing a timely petition in the United States Tax Court to contest the Notice of Deficiency. On July 19, 1990, the Tax Court entered a default judgment in favor of the Commissioner in the amount of $20,584.00.

On September 19, 1990, the Tax Court issued an order which clarified and reaffirmed the July 19, 1990 decision. That order explicitly stated that "[t]he issuance of this order does not affect the running of the time period set forth in sections 7481 and 7483 of the Internal Revenue Code." On October 15, 1990, plaintiffs filed a Motion to File a Motion to Vacate the Tax Court's July 19, 1990 order. On the same date plaintiffs lodged with the Tax Court a motion to vacate or revise the order of July 19, 1990. On September 26, 1991, the Tax Court denied plaintiffs' motion for leave to file a motion to vacate the July 19, 1990, order.

Meanwhile, on December 12, 1990, defendant Commissioner caused an assessment to be made against plaintiffs in the amount of $98,550.44 for taxes owed for the 1975 tax year. A Notice of Intent to Levy was mailed to plaintiff on or about May 6, 1991. Plaintiffs responded by submitting a motion to restrain assessment and collection with the Tax Court. The Tax Court did not act on the motion and it was returned unfiled. On or about October 31, 1991, defendant recorded a notice of federal tax lien in the Office of the Recorder of the County of Nevada, California. On November 8, 1991, plaintiffs filed an administrative appeal of the filing of the lien which was denied on or about January 15, 1992. Plaintiffs also filed a Notice of Appeal to the Ninth Circuit from the decisions of the Tax Court. However, plaintiffs were unable to secure the bond necessary for the appeal.

ISSUE

The issue presented in these cross-motions is whether the assessment of the plaintiffs' 1975 income tax deficiency was premature and therefore void. The court concludes that it was not.[1]

DISCUSSION

Title 26 U.S.C. § 6213 (a) prohibits the United States from assessing or collecting a deficiency until the expiration of the period for filing a Tax Court petition, or if the taxpayer files such a petition until the Tax Court decision becomes final. A Tax Court decision becomes final "[u]pon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time." 26 U.S.C. § 7481 (a) (1). The notice of appeal must be filed within 90 days after the decision has been entered. 26 U.S.C. § 7483. Any motion to vacate or revise a decision shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit. Rules of Practice and Procedure of the Tax Court, Rule 162.

Here, the Tax Court's decision was entered July 19,

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[1]If the assessment was premature, it would be void and the Commissioner would be time barred from making another assessment. Although some courts have held that such an assessment is not void, but merely gives rise to a right to have the collection of the deficiency enjoined, *Lyddon & Co. v. United States v. Walker*, 141 Ct. Cl. 545, 158 F. Supp. 951 (1958), *cert. denied*, 358 U.S. 832 (1958); *Lehigh Portland Cement Co. v. United States*, 90 Ct. Cl. 36, 30 F.Supp. 217 (1939), the Ninth Circuit has held that such an assessment is invalid and does not toll the running of the statute of limitations. *Ventura Consolidated Oil Fields v. Rogan*, 86 F.2d 149 (9th Cir. 1936), *cert. denied*, 300 U.S. 672 (1937). The statute of limitations begins to run 60 days from the date the Tax Court decision becomes final. 26 U.S.C. §§ 6501, 6503.

1990. Plaintiff did not file a notice of appeal within 90 days. Therefore, the decision became final on October 17, 1990. The assessment, made December 12, 1990 therefore was not premature.

The Tax Court's September 19, 1990 modification of the July 19, 1990 order cannot be construed to have extended the time for appeal since the court specifically stated that "[t]he issuance of this order does not affect the running of the time period set forth in sections 7481 and 7483 of the Internal Revenue Code." The Tax Court Rules of Practice and Procedure do not directly address whether the issuance of a subsequent order automatically restarts the time for filing an appeal. However, the Tax Court, apparently finding no cause to relieve the plaintiffs from its July 19, 1990 judgment, made it explicitly clear that the order did not affect the finality of that judgment. This court does not sit in review of the Tax Court and will not act to overturn its rulings. *See Quirk's Estate v. C.I.R.*, 521 F.2d 723 (9th Cir. 1975). Thus, the court accepts the Tax Court's determination that the September 19, 1990 order did not affect the running of the time for appeal.

Furthermore, an untimely motion for leave to file a motion to vacate does not extend the time to appeal or the date upon which a Tax Court decision becomes final. *See Denholm & McKay Co. v. C.I.R.*, 132 F.2d 243, 248 (1st Cir. 1942). Rule 13 (a) of the Federal Rules of Appellate Procedure provides that "[t]he running of the time for appeal is terminated as to all parties by a *timely* motion to vacate or revise made pursuant to the Rules of Practice of the Tax Court." (Emphasis added.) To expand the Rule to cover motions for leave to file motions to vacate or revise out of time would be to render the timeliness requirement superfluous. See 2A Sutherland Statutory Construction § 46.06 (4th ed. 1984) (court must, where possible, give effect to all

phrases of a statute so that none become superfluous).

While the Tax Court may have had the power to vacate the judgment at the time the motion to file out of time was filed, the motion was untimely and pursuant to Tax Rule 162 it was within the Tax Court's discretion to deny the motion to file out of time. Unlike the filing of a timely motion to vacate or revise, the filing of plaintiffs' motion for leave to file out of time would not affect the time for appeal unless the Tax Court granted the motion and considered the merits of the motion to vacate or revise. *See Trohimovich v. C.I.R.*, 776 F.2d 873, 875 (9th Cir. 1985) ("If *within 30 days of entry of the decision*, a party files a motion to vacate or revise the decision pursuant to Rule 162 . . ., the time for filing a notice of appeal is tolled until the Tax Court rules on the motion." (Emphasis added).[2]

The Tax Court's actions may very well have contributed to plaintiffs' subjective belief that the time for appeal of the July 19, 1990 order was tolled pending resolution of the various motions, including the motion for leave to file out of time.[3] However, the Ninth Circuit has

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[2]Plaintiffs have cited one case which upon first glance appears to stand for the proposition that the mere filing of a motion within the statutory period extends the time for appeal. *See Simon v. Commissioner*, 176 F.2d 230, 231 (2d Cir. 1949). However, the Tax Court in that case granted the motion for leave to file out of time and then denied the motion for review. Therefore, that case is consistent with the interpretation that the time for appeal is only affected if the Tax Court exercises its discretion to allow the filing of an untimely motion.

[3]Prior to the determination that the motion for leave to file out of time would be denied, the Tax Court issued an order on January 11, 1991 which ordered defendant to respond to, among other motions, plaintiff's attorney's motion to

held that "ambiguous or implicitly misleading conduct by courts does not release litigants from their appeal deadlines. If a party believes a court has acted ambiguously as to an appeal deadline, it bears the burden of seeking clarification." *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462-63 (9th Cir. 1992) (citation omitted). The Tax Court's actions on January 11, 1991 in requesting responses from defendant on the various pending motions and ruling on the motions on September 26, 1991 did not serve to extend the time by which the July 19, 1990 order became final.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment be, and the same is, hereby DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment be, and the same is, hereby GRANTED.

DATED: July 28, 1992

(signed) WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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intervene, plaintiffs' motion to vacate or revise the decision and plaintiffs' motion to file out of time.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 14 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ALLAN S. HALEY; ROBERTA J. ROWLANDS,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

No. 91-70739

Tax Court No. 28076-83

O R D E R

Before: SNEED, POOLE, and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 14 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ALLAN S. HALEY; ROBERTA J. ROWLANDS,

Plaintiffs-Appellants,

v.

UNITED STATES INTERNAL REVENUE SERVICE,

Defendant-Appellee.

No. 92-16391

D.C. No. CV-91-01617 WBS(PAN)

O R D E R

Before: SNEED, POOLE, and TROTT, Circuit Judges.

The panel has voted unanimously to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
MAR 18 1994
CLERK

No. 93-1156

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALLAN S. HALEY AND ROBERTA J. ROWLANDS,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE
AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
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Washington, D.C. 20530
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QUESTION PRESENTED

Whether a motion for leave to file out of time a motion to vacate or revise a Tax Court decision, filed more than 30 days but within 90 days after entry of the decision, and thereafter denied by the Tax Court, tolls the running of time for appeal of the Tax Court decision.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1156

ALLAN S. HALEY AND ROBERTA J. ROWLANDS,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE
AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A5, A6-A8) are unpublished, but the decisions are noted at 5 F.3d 536 (Table). The opinions of the Tax Court (Pet. App. A9-A17, A18-A20) are unreported. The opinion of the district court (Pet. App. A21-A26) is reported at 805 F. Supp. 834.

JURISDICTION

The judgments of the court of appeals were entered on August 16, 1993. Petitions for rehearing were denied on October 14, 1993 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on January 12, 1994. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 29, 1983, the Internal Revenue Service issued a notice of deficiency to petitioners Allan S. Haley and Roberta J. Rowlands in connection with their joint income tax return for 1975. The notice described a deficiency of $20,584 in income taxes for 1975, as well as additions to tax for negligence under 26 U.S.C. 6653(a) (Pet. 5). Petitioners filed a timely petition for review of the deficiency in Tax Court.

On November 24, 1986, petitioners' counsel executed on their behalf a stipulation of settlement for tax shelter adjustments, in which the IRS conceded that petitioners would not be liable for additions to tax under 26 U.S.C. 6653(a) for any years prior to 1982 (No. 91-70739: CR 10; CR 19 at 2).* The stipulation was filed with the Tax Court on December 1, 1986. (*Ibid.*). On April 2, 1987, a request for admissions was served on petitioners' counsel, seeking admission that the transactions at issue in this case were the same as those considered by the Tax Court in the test case of *Pike* v. *Commissioner*, 78 T.C. 822 (1982), aff'd, 732 F.2d 164 (9th Cir. 1984). Petitioners' counsel received the request on April 28 or 29, 1987 (No. 91-70739: CR 27 Exh. A). Neither petitioners nor their counsel filed any response to that request.

2. a. On January 29, 1990, the IRS filed a motion for an order to show cause why decision should not be entered against petitioners on the basis of the court's decision in

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* "CR" references are to the docket control numbers assigned to documents in the original record on appeal by the clerk of the Tax Court in No. 91-70739 and by the clerk of the district court in No. 92-16391. Each CR reference is preceded by the Ninth Circuit docket number to which it pertains.

Pike v. *Commissioner*, *supra*. On July 19, 1990, after requesting and reviewing a response from petitioners, the Tax Court issued a decision holding that the matters contained in the request for admissions were deemed admitted as of May 4, 1987, because no timely response had been filed and no extension had been requested or granted by the court (No. 91-70739: CR 19 at 2). The Tax Court further held that, based on the deemed admissions, decision should be entered against petitioners for 1975 in the full amount of the asserted deficiency except that, due to the stipulation of settlement, no additions to tax under 26 U.S.C. 6653(a) would be imposed (No. 91-70739: CR 19 at 2-3).

On September 19, 1990, the Tax Court issued an order clarifying certain immaterial matters within the decision entered on July 19, 1990. In that clarifying order, the court explicitly stated that these revisions did not alter or affect the running of the time period under 26 U.S.C. 7481 for the finality of the original decision or the time to appeal from that decision under 26 U.S.C. 7483 (No. 91-70739: CR 20).

On October 15, 1990, petitioners filed a motion for leave to file out of time a motion to vacate or revise the decision of July 19, 1990 (No. 91-70739: CR 27). The Tax Court lodged but did not file the accompanying proposed motions (No. 91-70739: CR 37).

On December 12, 1990, the IRS assessed the deficiency that the Tax Court's decision sustained (No. 92-16391: CR 1 at 3-4 & Exh. 8). On May 6, 1991, the IRS issued a notice of intent to levy to collect the taxes due (No. 92-16391: CR 1 Exh. 11).

On September 26, 1991, the Tax Court issued an order denying all of petitioners' pending motions, including the motion for leave to file a motion to vacate or revise out of

time (No. 91-70739: CR 37). On November 27, 1991, petitioners filed a notice of appeal (No. 91-70739: CR 38).

b. The court of appeals affirmed in part and dismissed in part (Pet. App. A1-A5). The court rejected petitioners' argument that the time for filing an appeal was tolled simply by the filing of a motion for leave to file out of time a motion to vacate or revise the Tax Court's decision (*id.* at A3-A4). The court also rejected petitioners' contention that the Tax Court order of September 19, 1990, "modified" the order of July 19, 1990, and therefore started a new appeal period (*id.* at A3). The court found that the September 19 order merely clarified and did not have a substantive effect on the earlier order, and, by its explicit terms, did not affect the running of the appeal period. The court therefore dismissed petitioners' untimely appeal of the July 19, 1990, order (*id.* at A3-A4).

The court further concluded that the Tax Court had not abused its discretion in denying petitioners' motion for leave to file out of time. The court therefore affirmed the order of September 26, 1991 (Pet. App. A4-A5).

3. a. On November 22, 1991, petitioners filed a complaint in federal district court seeking injunctive and declaratory relief against enforcement of the assessment entered for their 1975 taxes. Petitioners claimed that the December 12, 1990, assessment was invalid because the decision of the Tax Court had not become final at that time. They asserted that (i) the order issued September 19, 1990, had extended the time for their appeal and (ii), in the alternative, the filing of a motion for leave to file out of time a motion to vacate or revise the Tax Court decision had, by its own force, tolled the running of the time for appeal (No. 92-16391: CR 1 at 5 & Exh. 9).

The district court granted the government's motion for summary judgment. The court held that the assess-

ment was not premature because the Tax Court's September 19, 1990, order, by its terms, did not affect the finality of the July 19 decision or the time for appeal from that decision (No. 92-16391: CR 20 at 4). The district court further held that an untimely motion for leave to file a motion to vacate or revise a Tax Court decision does not extend the time for appeal or the date on which the decision becomes final (No. 92-16391: CR 20 at 4-5).

b. The court of appeals affirmed (Pet. App. A6-A8). The court held that the decision of the Tax Court had become final when no notice of appeal was filed within 90 days following the July 19, 1990, order and that the assessment was therefore valid (*id.* at A7-A8). The court distinguished the decisions relied upon by petitioners, noting that each involved either timely motions to vacate or revise (motions filed within 30 days of the decision) or motions for leave to file out of time that were granted by the Tax Court (*id.* at A8).

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Rule 13(a) of the Federal Rules of Appellate Procedure states that "[t]he running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court." Tax Court Rule 162 specifies that motions to vacate or revise "shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit."

Taxpayers rely (Pet. 12-13) on *Simon* v. *Commissioner*, 176 F.2d 230 (2d Cir. 1949), for the proposition that the filing of a motion for leave to file out of time a

motion to revise or vacate *by itself* tolls the appeal time and delays the finality of the Tax Court decision. In *Simon*, the taxpayer filed a motion for leave to file out of time a motion for review by the full court 90 days after decision against him was entered. On the following day, the Tax Court granted the motion for leave to file out of time but denied the motion for review by the full court. The Second Circuit held that the appeal period was extended by the filing of the motion for leave to file out of time because it was filed within 90 days of the decision and was granted by the Tax Court, although the accompanying motion was denied. 176 F.2d at 231-232.

The present case differs from *Simon* in its controlling facts. Unlike *Simon*, where the motion for leave to file out of time was granted "pursuant to the Rules of Practice of the Tax Court" (Fed. R. App. P. 13(a)), in this case, the motion for leave to file out of time was denied by the Tax Court. Tax Court Rule 162 clearly permits the Tax Court to consider a motion to vacate or revise filed after 30 days following the decision (and within 90 days of that decision) but does not require it to consider such a motion. If the Tax Court chooses to consider such a motion, as it did in *Simon*, the time for appeal is thereby extended. 176 F.2d at 232. If, however, the Tax Court declines to consider such a motion, as it did in the instant case, the appeal period is not affected. It is well settled that the mere filing of an untimely motion to vacate or revise a decision does not toll the time for taking an appeal. See *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1977); *Sanders* v. *Clemco Industries*, 862 F.2d 161, 170 (8th Cir. 1988); *Denholm & McKay Co.* v. *Commissioner*, 132 F.2d 243, 248 (1st Cir. 1942).

2. Petitioners claim (Pet. 13) that there is a conflict between the Second Circuit's decision in *Simon* and the First Circuit's decision in *Denholm & McKay*. The as-

serted conflict, however, pertains to an issue that is not presented in this case. *Simon* involved a motion, filed on the 90th day, for leave to file out of time a motion for review by the full Tax Court. *Denholm & McKay*, which arose under the rules of the Board of Tax Appeals (the Tax Court's predecessor), also involved a motion to vacate or for reconsideration that was filed more than 30 days, but within 90 days, after entry of the Board's decision. In *Simon*, the Tax Court on the 91st day granted the motion for leave to file but denied the motion for full court review. The Second Circuit held that the time for appeal was thereby extended. In *Denholm & McKay*, the Board of Tax Appeals, acting eight months after entry of decision, granted the motion to vacate the decision. The First Circuit held that, absent some action by the Board within 90 days from entry of decision indicating that it was considering the untimely motion, the Board lost the power to rule on the untimely motion under its own Rules, and the Tax Court decision became final at the end of the 90th day. 132 F.2d at 248.

In the present case, the Tax Court *denied* the motion for leave to file out of time a motion to revise or vacate the court's decision. The question of the Tax Court's power under its Rules to *grant* such a motion after the 90th day after entry of decision—the issue with which *Simon* and *Denholm & McKay* dealt—is therefore not presented in this case. Thus, even if *Simon* and *Denholm & McKay* are in conflict, that alleged conflict is not at issue on the facts of this case. Review of the claimed conflict between *Simon* and *Denholm & McKay* is therefore not appropriate in this case. See, *e.g.*, *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) (declining to give advisory opinion); *Muskrat* v. *United States*, 219 U.S. 346, 362 (1911) (same).

3. Petitioners contend (Pet. 14) that the decisions of the court of appeals denied them the opportunity to seek review of grounds for reconsideration that were not discovered in a timely manner. As the court of appeals correctly noted, however, "taxpayers' own lack of attention and diligence explains most of their procedural misfortunes" (Pet. App. A5). None of the untimely evidence was unavailable to petitioners at any time during the lengthy proceedings below. Instead, "taxpayers injudiciously and inappropriately distanced themselves from *their own petition*" (*ibid.*). As the court of appeals concluded, after examining "the issues raised with great care" (*ibid.*):

> Rules are for a purpose. Failure to comply with rules has consequences. Under the circumstances, 13th-hour pleas for mercy and discretion from the Tax Court and the IRS are not well grounded.

4. Finally, petitioners contend that there is a separate issue of an "illegally premature assessment" (Pet. 15). The allegation that the assessment was "illegally premature" rests on the same arguments addressed above concerning the timeliness of their appeal. As we have described, there is no conflict among the courts of appeals concerning whether petitioners' appeal was untimely. The further issue that petitioners now propose to raise in this Court—concerning whether a "premature" assessment is "void" or only "suspended" until the Tax Court decision becomes final—was not considered or addressed below. It therefore does not warrant this Court's consideration at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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